Office-Supreme Court, U.S.
FILED
FEB 13 1985
ALEXANDER L. STEVAS, CLERK

NO. 84-1120

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

Committee On Professional Standards,

Petitioner,

v.

Eric P. von Wiegen, Attorney,

Respondent.

On Petition For A Writ Of Certiorari To Review The Judgment Of The Court Of Appeals Of The State Of New York.

# RESPONDENT'S BRIEF IN OPPOSITION

SANFORD ROSENBLUM
Counsel of Record for Respondent
732 Madison Avenue
Albany, NY 12208
(518) 463-1107

LEWIS B. OLIVER, JR.
OLIVER & OLIVER
Attorneys for Respondent
156 Madison Avenue
Albany, New York 12202
(518) 463-7962

Table of Contents.

REASONS WHY THE WRIT SHOULD BE DENIED.....2

I. The Decision Below Does Not Conflict With Other States' Decisions.....2

II. The Decision Below Correctly Interprets And Applies The Previous Decisions Of This Court....4

III. This Case Is Not An Appropriate Vehicle To Decide The Question Presented.....7

IV. The Decision Below Is Not Final And The Petition For A Writ Of Certiorari Is Premature..7

Conclusion.....10

TABLE OF AUTHORITIES.

CASES: Page

Central Hudson Gas vs. Public Service Commission, 447 U.S. 557 (1980).....5

Chicago G.W.R. Co. vs. Basham, 249 U.S. 164 (1919).....10

In re Primus, 436 U.S. 412 (1977).....3,4,5

In the Matter of Koffler, 51 N.Y. 2d 140 (1980), cert. den. 450 U.S. 1026 (1981).....5

In the Matter of R.M.J., 445 U.S. 191, 206 (1982).....4,5

Kentucky Bar Assn. vs. Stuart, 568 S.W. 2d 933 (Ky. 1978) (same).....3

Matter of Appert, 315 N.W. 2d 204 (Minn. 1981).....2

Matter of Teichner, 387 2d 265 (Ill. 1979).....3

Ohralik vs. Ohio State Bar Assn., 436 U.S. 447 (1978).....4,5

Woll vs. Attorney General, 297 N.W. 2d 578 (Mich. 1980).....3

Zauderer vs. Office of Disciplinary Counsel, 461 N.E. 2d 883 (Ohio 1984), prob. jur. noted 53 U.S.L.W. 3235 (10/1/84).....6

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

---

Committee On Professional Standards,

Petitioner,

v.

Eric P. von Wiegen, Attorney,

Respondent.

---

On Petition For A Writ Of Certiorari To Review The Judgment Of The Court Of Appeals Of The State Of New York.

---

# RESPONDENT'S BRIEF IN OPPOSITION

---

The respondent, Eric P. von Wiegen, Attorney, respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the New York Court of Appeals opinion in this case. That opinion is reported at 63 N.Y. 2d 163 (1984).

## REASONS WHY THE WRIT SHOULD BE DENIED

### I

### THE DECISION BELOW DOES NOT CONFLICT WITH OTHER STATES' DECISIONS.

The decision of the New York Court of Appeals is not in conflict with the decision of the highest courts of any other states. None of the cases cited by petitioners as creating a conflict among state courts of last resort (see Petition, at pp. 9-10) deal with direct mail solicitation of accident victims; those cases involve real property owners, persons arrested for driving while intoxicated, persons reported arrested in the newspapers, and clients of a former law firm, but no case cited by petitioners addresses direct mail solicitation of accident victims. In fact, the only decisions by a state court of last resort addressing the issue is in agreement with the Court of Appeals decision in von Wiegen that direct mail solicitation of potential personal injury plaintiffs is constitutionally permissible. Matter of Appert, 315 N.W. 2d 204 (Minn. 1981);

see also Matter of Teichner, 387 N.E. 2d 265 (Ill. 1979).

The highest courts of several states that have considered the issue are tending to accept the fundamental change permitting solicitation by attorneys and have approved direct mailings to potential clients. Woll vs. Attorney General 297 N.W. 2d 578 (Mich. 1980), on remand, 323 N.W. 2d 560 (Ct. App., Mich. 1982) (direct mail solicitation by attorneys protected commercial speech); Kentucky Bar Assn. vs. Stuart, 568 S.W. 2d 933 (Ky. 1978) (same).

Moreover, this case is not an appropriate vehicle for this Court to pass judgment upon Rule 7.3 of the proposed Model Rules of Professional Conduct of the American Bar Association. Rule 7.3 prohibits all direct mail solicitation by attorneys, and on its face Rule 7.3 would prohibit even the direct mailings approved in In re Primus, 436 U.S. 412 (1977). The constitutionality of Rule 7.3 should be decided in a concrete situation

where it has been adopted and applied to an attorney in a disciplinary proceeding by the highest court of a state.

II.

THE DECISION BELOW CORRECTLY INTERPRETS AND APPLIES THE PREVIOUS DECISIONS OF THIS COURT.

The New York Court of Appeals has properly applied the principles with respect to advertising by attorneys announced in cases previously decided by this Court and reached the correct result in this case. In Matter of Primus, supra, 436 U.S. 412, this Court held that direct mail solicitation of specific clients by attorneys, in behalf of a non-profit organization which pursued litigation as a vehicle for political expression and association, was protected by the First Amendment. In Ohralik vs. Ohio State Bar Assn., 436 U.S. 447 (1978), a restriction on in-person solicitation of accident victims while still in the hospital was sustained, based on the possibility of overreaching inherent in a person-to-person confrontation. In the Matter of R.M.J., 455 U.S. 191, 206 (1982),

upheld the right of an attorney to direct mail cards announcing the opening of his office to the general public as commercial speech protected by the First Amendment.

In Matter of Koffler, 51 N.Y. 2d 140 (1980), cert. den. 450 U.S. 1026 (1981), the New York Court of Appeals analyzed the above precedents announced by this Court including the four-part analysis of Central Hudson Gas vs. Public Service Commission, 447 U.S. 557 (1980). The Court of Appeals correctly concluded that direct mail solicitation by attorneys of a targeted group of clients, such as real property owners, was protected as commercial speech. The decision of the Court of Appeals in this case is simply corollary of its Koffler decision.

This Court has already articulated the principles to be applied by the state courts in deciding content based restrictions upon attorney advertising in Primus, Ohralik, R.M.J., and Central Hudson. Further guidance with respect to

newspaper advertisements aimed at a targeted group may be provided when this Court announces its decision in Zauderer vs. Office of Disciplinary Counsel, 461 N.E. 2d 883 (Ohio 1984), prob. jur. noted 53 U.S.L.W. 3235 (10/1/84), which was orally argued on January 7, 1985. Petitioners would encourage this Court to review one case for each possible permutation of restriction upon attorney advertisement by time, place and manner (in person, by mail, by a third party, in a newspaper, magazine, television, telephone book, on radio, billboard, etc.) and by content (general public, targeted groups, recent victims, not-so-recent victims, individuals, etc.). The highest courts of the states are capable of applying the existing precedents to the numerous permutations of factual situations, as illustrated by the New York Court of Appeals correct determination below.

III.

THIS CASE IS NOT AN APPROPRIATE VEHICLE TO DECIDE THE QUESTION PRESENTED.

This case is not an appropriate vehicle for resolution of the question presented, because of the interweaving of the constitutional issue with the finding of deceptive and misleading statements, which are not protected as commercial speech. Although the two issues are analytically distinct and were considered separately by the Court of Appeals, the petition mixes and confuses the two issues (see Petition, at pp. 7, 12-13), and it would be preferable for this Court to resolve the question presented in a case where no other issues are interjected.

IV.

THE DECISION BELOW IS NOT FINAL AND THE PETITION FOR A WRIT OF CERTIORARI IS PREMATURE.

The New York Court of Appeals ordered that this case be remitted to the Appellate Division, Third Department, for reconsideration of the sanction imposed. (See Petition, at p. 15a). The Appellate Division of the Supreme Court of the State of New York is an intermediate appellate court which has jurisdiction over matters of

attorney discipline in the State of New York pursuant to New York Judiciary Law 90. At the initial hearing before the referee appointed by the Appellate Division, Third Department, neither the petitioner committee nor the respondent presented any evidence by way of testimony or affidavits from any of the victims or family members of victims from Kansas City with whom respondent had spoken by telephone after the Hyatt disaster.

After the New York Court of Appeals remitted to the Appellate Division for reconsideration on the issue of sanction, petitioner made a timely motion for reargument or renewal on the merits to the Appellate Division, Third Department. The basis for this rehearing is, in part, affidavits from the three victims or family members of victims of the Hyatt disaster with whom respondent had the most communication. In the motion for reargument or renewal, it is argued that the first letter (see Petition, at p. 20a) was not a

solicitation of legal business for respondent, and the affidavits of the victims and family members confirm that in fact respondent did not solicit them to retain him, but respondent only provided them with information and answers to their questions about their legal rights. In addition, the affiants expressed their belief that they received helpful information and assistance from respondent, and that respondent had not been deceptive or misleading in his communications with them. Based on the affidavits, the motion for reargument or renewal also requests the Appellate Division to reverse on the merits the finding that the letters were deceptive or misleading. The Appellate Division, Third Department, heard oral argument on the issue of sanction and on the papers requesting rehearing on February 8, 1985, and a decision thereon is still pending.

As of the date of the brief in opposition herein, since a motion for reargument or renewal is pending in the New York courts, it is

respectfully submitted that the decision sought to be reviewed is not final within the meaning of 28 U.S.C. 1257 and that the petition for a writ of certiorari is premature. Chicago G.W.R. Co. vs. Basham, 249 U.S. 164 (1919).

## CONCLUSION

For the above stated reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

SANFORD ROSENBLUM
Counsel of Record for
Respondent
732 Madison Avenue
Albany, NY 12208
(518) 463-1107

LEWIS B. OLIVER, JR.
OLIVER & OLIVER
Attorney for Respondent
156 Madison Avenue
Albany, NY 12202
(518) 463-7962